

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	
)	Case No. CIV-17-058-RAW
v.)	
)	Criminal Case No. CR-15-037-RAW
KEVIN BERNARD GREEN,)	
)	
Defendant/Petitioner.)	

ORDER

On February 10, 2017, Defendant Kevin Bernard Green (hereinafter “Defendant”) timely filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence [CIV Doc. 1, CR Doc. 207]. Thereafter, on April 27, 2017, Defendant filed an amended § 2255 motion [CIV Doc. 5, CR Doc. 208]. In sum, Defendant contends that his trial counsel, Terry Weber, was ineffective. Defendant initially asserted that Mr. Weber failed to consult with him and failed to file a notice of appeal. Later, in a reply, Defendant specifically claimed that he “informed his attorney that he wanted to appeal the issues objected to at the [s]entencing hearing” and that Mr. Weber informed Defendant that he would file the Notice of Appeal. [CIV Doc. 14 at 2]. According to Defendant, this conversation took place “directly after the conclusion of the sentencing proceedings [sic].” *Id.* Defendant also claimed that he “tried on several occasions to contact his attorney of record,” that “Mr. Weber would not come to visit, or answer his phone,” and that his “time to file Notice of Appeal was allowed to elapse without an appeal being filed.” *Id.*

In light of these specific allegations, and relying upon *Strickland v. Washington*, 466 U.S. 668 (1984), *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) and *United States v. Garrett*, 402 F.3d 1262, 1266-67 (10th Cir. 2005), the matter was referred to a magistrate judge for evidentiary hearing. [CIV Doc. 18, CR Doc. 212]. New counsel was appointed and United States Magistrate Judge Steven P. Shreder heard evidence on April 10, 2019.

Now before the court is the Report and Recommendation [CIV Doc. 24] issued by Magistrate Judge Shreder. The Magistrate Judge recommends the § 2255 motion be denied. The uncontested testimony from the evidentiary hearing showed “neither the Defendant nor any of his

family members contacted Mr. Weber after the sentencing hearing regarding the filing of an appeal for the Defendant, and that there had been no discussions or instructions to do so prior to the sentencing hearing.” *Id.* at 9. Defendant did not provide specific instructions to trial counsel as to the filing of an appeal. Moreover, counsel’s failure to consult in the case at hand did not constitute deficient performance. *Id.* at 10-13. Defendant has timely filed his Objection to the Report and Recommendation [CIV Doc. 26], which the court has duly considered.

The court has conducted a *de novo* review, and the undersigned fully concurs with the analysis set forth in the Report and Recommendation. Defendant failed to establish ineffective assistance of counsel and is not entitled to relief under 28 U.S.C. § 2255.

In addition, a certificate of appealability may issue only if Defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To satisfy this standard, Defendant “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The standard has not been satisfied, and this court hereby declines to issue a certificate of appealability.

IT IS THEREFORE ORDERED that:

Defendant’s Objection to the Report and Recommendation [CIV Doc. 26] is overruled;

The Report and Recommendation [CIV Doc. 24] is adopted and affirmed as the order of the court;

Defendant’s motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence [CIV Doc. 1, CR Doc. 207], as amended [CIV Doc. 5, CR Doc. 208], is denied and a separate judgment will be entered contemporaneously with this order; and

A certificate of appealability is denied under Rule 11(a) of the Rules Governing Section 2255 Proceedings.

It is so ordered this 24th day of May, 2019.



THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA